A

VIGNESH NAIDU KUPPUSAMY NAIDU
v. PREMA BONANZA SDN BHD & ANOTHER APPEAL

COURT OF APPEAL, PUTRAJAYA
YAACOB MD SAM JCA
VAZEER ALAM MYDIN MEERA JCA
B MOHD NAZLAN GHAZALI JCA
[CIVIL APPEAL NOS: W-02(IM)(NCVC)-880-04-2021
& W-01(IM)(NCVC)-881-04-2021]
23 JANUARY 2023

C

Abstract – *As reg. 11(3) of the Housing Development (Control and Licensing) Regulations 1989 is ultra vires the Housing Development (Control and Licensing) Act 1966, the Controller of Housing has absolutely no power to give any extension or to modify the statutory contract of sale entered into by house buyers, regardless of whether the extension is granted before or after the sale and purchase agreement had been signed with the purchasers.*

D

CIVIL PROCEDURE: *Summary judgment – Appeal against – Purchaser filed suit against developer at High Court – Claim for liquidated ascertained damages for late delivery of vacant possession – Purchaser filed for summary judgment – High Court refused summary judgment – Whether summary judgment ought to be granted – Whether there were triable issues – Rules of Court 2012, O. 14*

E

CIVIL PROCEDURE: *Striking out – Appeal against – Purchaser filed suit against developer at High Court – Claim for liquidated ascertained damages for late delivery of vacant possession – Purchaser filed for summary judgment while developer applied to strike out purchaser's suit – High Court refused summary judgment and struck out suit – Whether suit obviously unsustainable – Rules of Court 2012, O. 18 r. 19(1)*

F

LAND LAW: *Vacant possession – Extension of time – Developer and purchasers entered into sale and purchase agreements – Developer obtained extension of time of 18 months from Controller of Housing to complete project – Developer failed to deliver vacant possession within 36 months – Whether Controller of Housing had power to give any extension or to amend statutory contract entered into by house buyers – Whether extension granted before or after sale and purchase agreement had been signed – Housing Development (Control and Licensing) Regulations 1989 – Housing Development (Control and Licensing) Act 1966*

G

H

I

These were two related interlocutory appeals. The appellant was the owner of a unit in a property development project which was purchased from the respondent, the developer of the project, pursuant to a sale and purchase agreement ('SPA') entered into on 18 July 2012. Eighteen months prior to the execution of the SPA, the respondent had, on 16 December 2010, obtained an extension of time from the Controller of Housing under the Housing Development (Control and Licensing) Regulations 1989 ('Regulations') to complete the project, from the statutorily prescribed period of 36 months under the Regulations, to an extended period of 54 months. This extended completion period of 54 months was made known to the purchasers, including the appellant, and was accordingly reflected in cls. 25 and 27 of the SPA. On 25 January 2017, the respondent gave a written notice to the appellant on the issuance of the certificate of completion and compliance and on its readiness to deliver vacant possession of the unit to the appellant. The 54-month period from the date of the SPA expired on 17 January 2017. Vacant possession of the unit was therefore deemed delivered slightly later on 8 February 2017. More than three years later, on 21 August 2020, the appellant filed a suit against the respondent at the High Court to claim for liquidated ascertained damages ('LAD') amounting to RM392,021.92 for late delivery of vacant possession. The appellant contended that the last date to deliver vacant possession under the SPA should have been on 17 July 2015, which was based on the completion period of 36 months from the date of the SPA, as prescribed in the statutory form under Schedule H to the Regulations. The appellant filed an application for summary judgment whilst the respondent applied for the suit to be struck out. The High Court refused the summary judgment and struck out the appellant's suit. Hence, these appeals against the two decisions.

Held (allowing appeals)
Per Mohd Nazlan Ghazali JCA delivering the judgment of the court:

(1) It mattered not that the extension was granted after or prior to the SPA had been signed with the purchasers. As reg. 11(3) of the Regulations was *ultra vires*, the Controller of Housing had simply and absolutely no power to give any extension or to amend the statutory contract such that it was wholly inconsequential that the extension in this case was obtained before the execution of the SPA, whatever the background. This court was bound by the doctrine of *stare decisis* to follow *Ang Ming Lee v Menteri Kesejahteraan Bandar, Perumahan & Kerajaan Tempatan*. The extension of time by 18 months granted by the Controller of Housing, pursuant to reg. 11(3) of the Regulations, was not valid since reg. 11(3) was ruled to be *ultra vires*. This important point did not give rise to any triable issue. (paras 21, 22 & 24)

(2) The appellant was deemed to have taken delivery of vacant possession of his property in early February 2017. Accordingly, the appellant's cause of action to claim LAD accrued on that date. The six years limitation period under s. 6(1) of the Limitation Act 1953 would only expire in early February 2023. Since the instant suit was filed on 21 August 2020, which was clearly well within the limitation period, the appellant's claims were not barred by limitation. (para 31)

(3) The decision of the High Court, in dismissing the summary judgment application against the respondent and allowing the striking out of the appellant's claim, was in error and therefore warranted appellate intervention. There were no triable issues to deny summary judgment under O. 14 of the Rules of Court 2012 and the appellant's suit was certainly not obviously unsustainable to warrant it to be struck out summarily under O. 18 r. 19(1). The orders of the High Court were set aside and this court directed that the summary judgment application against the respondent be allowed and the striking out application against the appellant's claim be dismissed. (paras 61-63)

Case(s) referred to:

Abillah Labo Khan v. PP [2002] 3 CLJ 521 CA ***(refd)***

Alpine Return Sdn Bhd v. Matthew Ng Hock Sing & Ors [2022] 1 CLJ 120 HC ***(refd)***

Alvin Leong Wai Kuan & Ors v. Menteri Kesejahteraan Bandar, Perumahan Dan Kerajaan Tempatan & Ors And Other Applications [2020] 6 CLJ 55 HC ***(refd)***

Aminah Ahmad v. The Government Of Malaysia & Anor [2022] 2 CLJ 726 CA ***(refd)***

Ang Ming Lee & Ors v. Menteri Kesejahteraan Bandar, Perumahan Dan Kerajaan Tempatan & Anor And Other Appeals [2020] 1 CLJ 162 FC ***(refd)***

Chan Kwai Chun v. Lembaga Kelayakan [2002] 3 CLJ 231 CA ***(refd)***

Gan Yook Chin & Anor v. Lee Ing Chin & Ors [2004] 4 CLJ 309 FC ***(refd)***

Innab Salil & Ors v. Verve Suites Mont' Kiara Management Corporation [2020] 10 CLJ 285 FC ***(refd)***

Lim Yee Khei v. Berjaya Times Square Sdn Bhd [2003] 1 CLJ 527 HC ***(refd)***

Nasri v. Mesah [1970] 1 LNS 85 FC ***(refd)***

National Westminster Bank Plc v. Spectrum Plus Limited And Others [2005] All ER 209 ***(refd)***

Ng Hoo Kui & Anor v. Wendy Tan Lee Peng, Administrator Of The Estates Of Tan Ewe Kwang, Deceased & Ors [2020] 10 CLJ 1 FC ***(refd)***

Obata-Ambak Holdings Sdn Bhd v. Prema Bonanza Sdn Bhd & Another Appeal [2022] 5 CLJ 251 CA ***(refd)***

PP v. Dato' Yap Peng [1987] 1 LNS 28 HC ***(refd)***

Semenyih Jaya Sdn Bhd v. Pentadbir Tanah Daerah Hulu Langat & Another Case [2017] 5 CLJ 526 FC ***(refd)***

Silver Corridor Sdn Bhd v. Gallant Acres Sdn Bhd & Anor [2016] 7 CLJ 823 FC ***(refd)***

Toh Tiam Cheow & Ors v. Berjaya Times Square Sdn Bhd [2002] 4 CLJ 301 HC ***(refd)***

UE E&C Sanjia (M) Sdn Bhd v. Lee Jeng Yuh & Anor And Another Appeal [2021] 10 CLJ 271 CA ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 417
Land Acquisition Act 1960, s. 40D
Housing Development (Control and Licensing) Act 1966, s. 16A
Housing Development (Control And Licensing) Regulations 1989, regs. 11(3), 12, Schedule H
Limitation Act 1953, s. 6(1)(a)
Rules of Court 2012, O. 14, O. 18 r. 19(1), O. 53

For the appellant - Wong Renn Xin; M/s KL Wong
For the respondent - Lai Chee Hoe & Ooi Xin Yi; M/s Chee Hoe & Assocs

[Editor's note: For the High Court judgment, please see Vignesh Naidu Kuppusamy Naidu v. Prema Bonanza Sdn Bhd [2021] 1 LNS 2551 (overruled).]

Reported by Lina E

JUDGMENT

Mohd Nazlan Ghazali JCA:

Introduction

[1] These are two related interlocutory appeals. One is an appeal against the dismissal of the appellant's summary judgment application whilst the other was in relation to an appeal against the striking out of the appellant's suit. Both concerned the claim by the appellant purchaser for damages for late delivery of vacant possession, beyond the statutorily stipulated period, despite an extension of time having been obtained by the respondent developer.

[2] Like in the High Court, these were heard together before us where at the conclusion of the hearing which was conducted by way of a remote communication technology *via* Zoom we found for the appellant and allowed both appeals, set aside the decision of the High Court, and highlighted the main grounds for our decisions. These grounds of judgment contain the full reasons for the same.

Key Background Facts

[3] The appellant is the owner of a unit in a property development project known as the Sentral Residences which was purchased from the respondent company as the developer of the project at RM2,168,000, pursuant to a sale and purchase agreement ('the SPA') entered into on 18 July 2012. The Sentral Residences was a mixed development project, comprising two tower of service apartments and had been described as a mega township project in Kuala Lumpur.

[4] Under the Housing Development (Control and Licensing) Regulations 1989 ('the Regulations'), which was made pursuant to the Housing Development (Control and Licensing) Act 1966 ('the HDA'), specifically on

A the provision concerning the statutory sale and purchase agreement prescribed under Schedule H of the Regulations, where in respect of stratified properties, a developer like the respondent is required to deliver vacant possession of the parcels and to complete the common facilities of the residential development within 36 months. Failure on the part of the
B developer entitles the purchasers to be paid by the developer liquidated damages.

[5] Given the complexity and magnitude of the development of the project in the instant case, some 18 months prior to the execution of the SPA with the appellant and other purchasers, the respondent developer on
C 16 December 2010 had obtained an extension of time under the Regulations to complete the project, from the statutorily prescribed period of 36 months under the Regulations, to an extended period of 54 months.

[6] This extension was granted by the Housing Controller of the Ministry of Urban Wellbeing, Housing and Local Government under reg. 11(3) of the
D Regulations. This extended completion period of 54 months was known to the purchasers and accordingly reflected in cls. 25 and 27 of the SPA upon execution, including with the appellant on 18 July 2012.

[7] There can therefore be no dispute that the prescribed period of 54
E months for delivery was clearly reflected in cls. 25 and 27 of the SPA, as follows:

> 25. Time for delivery of Vacant Possession
>
> (1) Vacant possession of the said Parcel shall be delivered to the Purchaser in the manner stipulated in Clause 26 within fifty-four (54) calendar
F months from the date of this Agreement.
>
> (2) If the Vendor fails to deliver vacant possession in the manner stipulated in Clause 26 within the time stipulated in sub-clause (1), the Vendor shall be liable to pay to the Purchaser liquidated damages calculated from day to day at the rate of ten per centum (10%) per annum
G of the purchase price from the expiry date of the delivery of vacant possession in sub-clause (1) until the date the Purchaser takes vacant possession of the said Parcel. Such liquidated damages shall be paid immediately upon the date the Purchaser takes vacant possession of the said Parcel.
>
> (3) For the avoidance of doubt, any cause of action to claim liquidated
H damages by the Purchaser under this clause shall accrue on the date the Purchaser takes vacant possession of the said Parcel.
>
> 27. Completion of common facilities
>
> (1) The common facilities serving the said housing development shall be completed by the Vendor within fifty-four (54) calendar months from the
I date of this Agreement. The Vendor's architect shall certify the date of completion of the common facilities.

(2) If the Vendor fails to complete the common facilities in time the Vendor shall pay immediately to the Purchaser liquidated damages to be calculated from day to day at the rate of ten per centum (10%) per annum of the last twenty per centrum (20%) of the purchase price.

(3) For the avoidance of doubt, any cause of action to claim liquidated damages by the Purchaser under this clause shall accrue on the date the Vendor completes the common facilities.

[8] On 25 January 2017, the respondent gave written notice to the appellant on the issuance of the certificate of completion and compliance and on its readiness to deliver vacant possession of the unit to the appellant. The 54-month period from the date of the SPA expired on 17 January 2017. Vacant possession of the unit in this case was therefore deemed delivered slightly later on 8 February 2017.

High Court Decision

[9] More than three years later though, on 21 August 2020, the appellant filed a suit against the respondent at the High Court to claim liquidated ascertained damages (LAD) amounting to RM392,021.92 for late delivery of vacant possession. The appellant now contended that the last date to deliver vacant possession under the SPA should have been on 17 July 2015, which is based on the completion period of 36 months from the date of the SPA, as prescribed in the statutory form under Schedule H of the Regulations.

[10] The appellant then filed an application for summary judgment (encl. 5) under O. 14 of the Rules of Court 2012 ('the RC 2012') whilst the respondent reacted by applying for the suit be struck out (in encl. 20) under O. 18 r. 19(1) of the RC 2012. The learned High Court Judge as mentioned heard the two applications together and decided to refuse the summary judgment application but allow the appellant's suit to be struck out. The appellant thus filed an appeal against these two decisions. The appeals are now before us.

Principles Of Appellate Intervention

[11] We should first remind ourselves that the central feature of appellate intervention is well-established. It is to ascertain whether or not the trial court had arrived at its decision or finding correctly on the evidence and on the basis of the governing law. The Federal Court in the case of *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309 held as follows:

In our view, the Court of Appeal in citing these cases had clearly borne in mind the central feature of appellate intervention, *ie*, to determine whether or not the trial court had arrived at its decision or finding correctly on the basis of the relevant law and/or the established evidence. In so doing, the Court of Appeal was perfectly entitled to examine the process of evaluation of the evidence by the trial court. Clearly, the phrase

A 'insufficient judicial appreciation of evidence' merely related to such a process. This is reflected in the Court of Appeal's restatement that a judge who was required to adjudicate upon a dispute must arrive at his decision on an issue of fact by assessing, weighing and, for good reasons, either accepting or rejecting the whole or any part of the evidence placed before him. The Court of Appeal further reiterated the principle central to
B appellate intervention, *ie*, that a decision arrived at by a trial court without judicial appreciation of the evidence might be set aside on appeal. This is consistent with the established plainly wrong test.

[12] In the leading case of *Ng Hoo Kui & Anor v. Wendy Tan Lee Peng, Administrator Of The Estates Of Tan Ewe Kwang, Deceased & Ors* [2020]
C 10 CLJ 1, the Federal Court affirmed with unmistakable clarity that the principle on which an appellate court could interfere with findings of fact by the trial court is 'the plainly wrong test' principle.

[13] This important principle involves a number of circumstances, but
D must necessarily extend to situations where it can be shown that the impugned decision is vitiated with plain material errors, or where crucial evidence had been misconstrued, or where the trial judge had so manifestly not taken proper advantage of having seen and heard the witnesses or not properly analysed the entirety of the evidence before him, or where a decision was arrived at without adequate judicial appreciation of the
E evidence such as to make it rationally unsupportable.

Analysis And Findings Of This Court

Extension Is Void

[14] Central to these appeals is the Federal Court decision in *Ang Ming*
F *Lee & Ors v. Menteri Kesejahteraan Bandar, Perumahan Dan Kerajaan Tempatan & Anor And Other Appeals* [2020] 1 CLJ 162; [2020] 1 CLJ 162. For present purposes, the most crucial ruling by the Federal Court in *Ang Ming Lee* is that reg. 11(3) of the Regulations which confers on the housing controller the powers to waive or modify any provisions in the statutory contract in
G Schedule H to the Regulations is *ultra vires* its enabling legislation, the Housing Development (Control and Licensing) Act 1966. The Housing Controller has no power to waive or modify the 36-month period stipulated in the prescribed statutory contract of sale.

[15] The following passages from the judgment of Her Ladyship Tengku
H Maimun Tuan Mat CJ encapsulates the essence of the decision of the Federal Court:

[41] The legislative intent that the duties shall remain with the Minister, may be discerned from ss. 11 and 12 of the Act. Under s. 11, whilst the Controller is given the power to investigate on the reason why a licensed
I housing developer is unable to meet his obligation to the purchasers, or is about to suspend his building operations or is carrying on his business detrimental to the interests of the purchaser, it is the Minister who is

empowered to give directions and to take such other measures for purposes of safeguarding the interests of the purchasers and for carrying into effect the provisions of the Act. Likewise under s. 12 which provides for the powers of the Minister to give general directions as he considers fit, to the licensed housing developer for purposes of ensuring compliance with the Act. Such directions, which shall be given in writing, are binding on the developer.

...

[55] Finally, on the third task. In the instant appeals, the Schedule H contract of sale prescribed by the Regulations is to carry into effect the provisions of the Act, which is to protect the interests of the purchasers. The regulations made by the Minister must thus achieve the object of protecting the interests of the purchasers and not the interests of the developers. And at the risk of repetition, the duty to protect the interests of the purchasers is entrusted to the Minister.

...

[56] By delegating the power, *vide* reg. 11(3) to the Controller to waive or modify the prescribed terms and conditions of the sale of contract, it is now the Controller who has been entrusted to regulate the terms and conditions of the contract of sale. Further, by modifying the prescribed terms and conditions and by granting the developer the extension of time, the Controller has denied the purchasers' right to claim for LAD. This modification and the granting of extension of time to the developer, does not appear to us to protect or safeguard the purchasers but rather the developer and this militates the intention of Parliament.

[57] It was submitted for the developer that the purchasers would suffer greater hardship if the project is not completed as compared to not being able to claim for LAD. With respect, we fail to see the merit of this submission. If the developer fails to obtain an extension of time to deliver vacant possession, that in itself does not mean that the developer has failed to complete and hence, have abandoned the project. Whether or not the developer is granted an extension of time does not necessarily determine the fate of the project. The extension of time only determines payment of LAD. In this regard, we must not lose sight of the purchasers' obligations to pay for progress instalment to their respective housing financier and/or payment of rental to their landlord. It is a matter of balancing the commercial interest of a multi-million housing development company against the life-time loan commitment of a purchaser for a basic living necessity. As can be seen from the long line of authorities, it is the interests of the purchasers that prevail over that of the developer. We therefore hold that in allowing the Controller to waive or modify the terms and conditions of the contract of sale and in the process, denying the purchasers' right to claim for LAD as prescribed by the Minister under Schedule H, reg. 11(3) does not comply with the description of the Regulations which is designed to protect the interests of the purchasers.

[16] The underlying and overriding intention of the Federal Court in *Ang Ming Lee* as expressed in unmistakable fashion is to protect the interests of the purchasers, as the weaker parties in the sale and purchase agreements under the said Schedule H of the Regulations. The following is only one of the many emphases on that point found in the judgment:

> [40] The Act being a social legislation designed to protect the house buyers, the interests of the purchasers shall be the paramount consideration against the developer. Parliament has entrusted the Minister to safeguard the interests of the purchasers and the Minister has prescribed the terms and conditions of the contract of sale as per Schedule H. We find no contrary indication in the language, scope or object of the Act that such duty to safeguard the interests of the purchasers may be delegated to some other authority.

[17] In another recent decision of the Federal Court in *Innab Salil & Ors v. Verve Suites Mont' Kiara Management Corporation* [2020] 10 CLJ 285, in holding the Strata Management Act 2013 to be a social legislation, Her Ladyship Tengku Maimun CJ referred to *Ang Ming Lee* and again stressed the point that the HDA as a social legislation was legislated to protect house buyers from the developers, as follows:

> [24] The determination of the above question would necessarily involve the wholesome interpretation of s. 120 of the NLC *vis-à-vis* s. 70 of the SMA 2013. But before we do that, we bear in mind the decision of *Ang Ming Lee & Ors v. Menteri Kesejahteraan Bandar, Perumahan Dan Kerajaan Tempatan & Anor And Other Appeals* [2020] 1 CLJ 162; [2020] 1 MLJ 281 ('*Ang Ming Lee*'). In *Ang Ming Lee*, based on a settled line of precedents, this court construed the Housing Development (Control and Licensing) Act 1966, which was passed to protect house buyers from developers, as a social legislation.
>
> [25] A statute is said to be a 'social legislation' when Parliament passes the statute for a beneficent reason with the intention to ease or facilitate the affairs of, or protect a certain section or group of persons (see *Hoh Kiang Ngan v. Mahkamah Perusahaan Malaysia & Anor* [1996] 4 CLJ 687; [1995] 3 MLJ 369; *Veronica Lee Ha Ling & Ors v. Maxisegar Sdn Bhd* [2009] 6 CLJ 232; [2011] 2 MLJ 141).
>
> [26] It was passed to facilitate the affairs of strata living for the good of the community or owners of the strata title. Being social in nature, the provisions of the SMA 2013 which safeguard community interests ought to receive a liberal interpretation and not a restricted or rigid one. Accordingly, where two different interpretations are possible, it is the one which favours the interest of the community over the interest of the individual that is to be preferred. This is in line with the aforementioned decisions in *Ang Ming Lee* and *Hoh Kiang Ngan*.

[18] Now, a key argument raised by the respondent to resist this appeal as it did to oppose the appellant's summary judgment earlier at the High Court was that in *Ang Ming Lee*, the developer had already entered into the sale and

purchase agreements with the purchasers of the condominium units which provided that the delivery of the units was 36 months from the date of the agreement, in line with Schedule H of the Regulations. It was in that case only subsequently, without the knowledge of the purchasers, that the developer applied to the Housing Controller of the Ministry for an extension of time, pursuant to reg. 11(3) of the Regulations. An extension was in *Ang Ming Lee* said to have been eventually granted by the Minister on appeal pursuant to reg. 12 after it was initially refused by the housing controller.

[19] The sale and purchase agreements in *Ang Ming Lee* were then amended without the consent of the purchasers being obtained, denying their right to be heard, and depriving them the rights to claim for liquidated ascertained damages. Thus, the application for the extension of time by the developer in *Ang Ming Lee*, unlike in the instant case, was made after the agreements had been signed by the purchasers in which the initial completion date of the agreements was contracted to be 36 months in accordance with Schedule H.

[20] In plain contrast, the respondent in the instant case before us had, as mentioned earlier, before commencing the works, and prior to the entry of the SPAs with the purchasers such as the appellant, applied to the housing controller and obtained the requisite extension, for the construction period being extended from 36 months to 54 months.

[21] We cannot accept this contention. For clearly, it matters not that the extension was granted after the sale and purchase agreements had been signed with the purchasers, like in *Ang Ming Lee*, or prior to, like in the instant case. As reg. 11(3) is *ultra vires*, the housing controller has simply and absolutely no power to give any extension or to amend the statutory contract, such that it is wholly inconsequential that the extension in this case was obtained before the execution of the SPA, whatever the background.

[22] This court is in this respect bound by the doctrine of *stare decisis* to follow *Ang Ming Lee*. The extension of time by 18 months granted by the housing controller pursuant to reg. 11(3) of the Regulations in the instant appeals is not valid since reg. 11(3) itself is ruled to be *ultra vires*. It therefore must necessarily follow that the amendment made to the statutory contract to cls. 25 and 27 of Schedule H – from 36 months to 54 months – on the basis of the extension allowed by the housing controller under reg. 11(3) in this case is also void and of no effect.

[23] As such, the learned High Court Judge's finding that the prescribed period of 36 months is not a rigid number because the Regulations provide for an extension of time under reg. 11(3) is plainly erroneous. For the same reason that reg. 11(3), being the basis of the extension granted by the housing controller is *ultra vires* and therefore void, the other findings of the learned High Court Judge that appellant did not object or appeal to the Ministry on the extension, and that there were no amendments made to the completion

period after the parties had signed the SPA, unlike in the case of *Ang Ming Lee*, and that parties are bound by the terms of the SPA executed between them are all irrelevant.

[24] This important point does not give rise to any triable issue.

Estoppel Not Applicable

[25] We observe that the respondent had in fact already paid to the appellant certain LAD in the sum of RM13,067.40 for the late delivery of vacant possession in accordance with the terms of the SPA on the basis of the extended period. The appellant had even signed a letter dated 7 March 2017 and undertaken to waive any further claims against the respondent. The learned High Court Judge agreed with the respondent that the appellant was therefore estopped from denying what had been agreed between them.

[26] We disagree. It is settled law that an *ultra vires* act, such as the extension granted by the housing controller under reg. 11(3) cannot be legitimised through estoppel, waiver or agreement between parties. The doctrine of estoppel does not therefore apply against a statute or statutory agreement such as in the instant case which revolves around the clauses in a statutory contract as prescribed in Schedule H of the Regulations. The principle of waiver or estoppel is in other words not applicable when reg. 11(3) of the Regulations is *ultra vires* the HDA.

[27] The Federal Court in *Silver Corridor Sdn Bhd v. Gallant Acres Sdn Bhd & Anor* [2016] 7 CLJ 823; [2016] 5 MLJ 1 also held that estoppel, being an equitable principle cannot operate to defeat clear statutory provisions of law. Ramly Ali FCJ delivering the judgment of the court in that case stated as follows:

> **Estoppel**
>
> [57] The issue of estoppel was also raised by the defendant. The defendant argued that the first plaintiff had accepted the defendant's payment of the full purchase price for all the 12 shop lots and never evinced any intention to refund the same. By that conduct, the defendant claimed that the first plaintiff was estopped from relying on s. 293 of the CA as an instrument of fraud to prevent the defendant from receiving the properties which it had paid for.
>
> [58] Our view is that the plaintiffs' claim is based on statutory provisions of s. 293 of the CA read together with s. 52 of the BA. These statutory provisions, as we have discussed earlier, are clear and unambiguous. Estoppel, being an equitable principle cannot operate to defeat clear statutory provisions of law. This settled principle of law was adopted by Edgar Joseph Jr in *United Malayan Banking Corporation Bhd v. Syarikat Perumahan Luas Sdn Bhd (No 2)* [1988] 3 MLJ 352b when His Lordship ruled that: 'The defence of estoppel accordingly fails since there cannot be an estoppel to evade the plain provisions of a statute, ... particularly when the non-compliance goes to the root of the thing'.

[28] If allowed to operate in this case, an estoppel or waiver would also defeat the very purpose of the HDA which is a social legislation enacted to control housing development and protect the interests of purchasers. There is as such no basis to the contention that this is a triable issue.

Action Not Statute-Barred

[29] Two other important points raised in the proceedings below but not clearly addressed by the learned High Court Judge are whether the action by the appellant is statute-barred and whether he should have instituted a judicial review instead.

[30] We find that the appellant's right to claim LAD only arose on the date he accepted delivery of vacant possession of his property unit, consistent with cl. 25(2) of the SPA which states as follows:

> For the avoidance of doubt, any cause of action to claim for liquidated damages by the Purchaser under this clause shall accrue on the date the Purchaser takes vacant possession of the said Parcel.

[31] Here, the appellant is deemed to have taken delivery of vacant possession of his property in early February 2017. Accordingly, the appellant's cause of action to claim LAD accrued on that date. The six years limitation period under s. 6(1)(a) of the Limitation Act 1953 would only expire in early February 2023. Since the instant suit was filed on 21 August 2020, which clearly is well within the limitation period, the appellant's claims are not barred by limitation.

[32] We are mindful that a contrary conclusion on this issue has been arrived at by this court in a recent case of *Obata-Ambak Holdings Sdn Bhd v. Prema Bonanza Sdn Bhd & Another Appeal* [2022] 5 CLJ 251, to the effect that the essence of the pleaded case of the appellant is that the SPA had breached Schedule H to the Regulations when the period to deliver vacant possession was amended from 36 months to 54 months.

[33] It was contended that by the said amendment, the respondent had infringed the HDA and Schedule H to the Regulations, rendering the amendment invalid and not binding on the appellant. And the respondent would still be bound to deliver vacant possession within 36 months, as per Schedule H of the Regulations. This court in *Obata-Ambak* thus stated:

> [29] Therefore, in gist, on its pleaded case, the plaintiff's cause of action is that:
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> (i) that the SPAs were invalid at the time of signing, as the SPAs had failed to comply with the prescribed Schedule H; and
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> (ii) that the defendant has breached Schedule H of the HDR 1989, by amending the time for delivery of vacant possession from 36 months to 54 months.

[34] In other words, in light of *Obata-Ambak*, it is contended by the respondent that here, the appellant is in fact challenging the validity of the amendment to cls. 25 and 27 of the SPA, from the date of its execution. And because the contractual breach is the very amendment to these clauses, the appellant's cause of action runs from the date of the execution of the SPA, which in this case is 18 July 2012. In such event though, the appellant's claim would be barred by limitation, as the six-year period would have expired on 17 July 2018.

[35] It is nonetheless trite that a cause of action founded on a contract usually accrues on the date of its breach, or from the date when that right is infringed or when there is a threat of its infringement. The Federal Court in *Nasri v. Mesah* [1970] 1 LNS 85; [1971] 1 MLJ 32, in the judgment of Gill FJ had this to say on the subject:

> A "cause of action" is the entire set of facts that gives rise to an enforceable claim; the phrase comprises every fact which, if traversed, the plaintiff must prove in order to obtain judgment (per Lord Esher MR in *Read v. Brown* (1888) 22 QBD 128 131). In *Reeves v. Butcher* (1891) 2 QB 590 511 Lindley LJ said: "This expression, 'cause of action', has been repeatedly the subject of decision, and it has been held, particularly in *Hemp v. Garland* LR 4 QB 509 511, decided in 1843, that the cause of action arises at the time when the debt could first have been recovered by action. The right to bring an action may arise on various events; but it has always been held that the statute runs from the earliest time at which an action could be brought.
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> In *Board of Trade v. Cayzer, Irvine & Co* [1927] AC 610 at p 617. Viscount Dunedin described 'cause of action' as that which makes action possible. Now, what makes possible an action founded on a contract is its breach. In other words, a cause of action founded on a contract accrues on the date of its breach. Similarly, the right to sue on a contract accrues on its breach. In the case of actions founded on contract, therefore, time runs from breach (per Field X in *Gibbs v. Guild* 8 QBD 296 at p 302). In the case of actions founded on any other right, time runs from the date on which that right is infringed or there is a threat of its infringement (see *Bolo*'s case LR 57 IA 74). It would seem clear, therefore, that the expressions 'the right to sue accrues', 'the cause of action accrues' and 'the right of action accrues' mean one and the same thing when one speaks of the time from which the period of limitation as prescribed by law should run.

[36] In our view, where the contractual breach concerns a claim for LAD as pleaded in this case, we do not think it is correct to hold that the cause of action accrues on the date of the SPA, despite the contention that the breach occurred when cls. 25 and 27 were made to depart from Schedule H of the Regulations. We say so because of two principal reasons.

[37] First, no liquidated damages could be claimed by the appellant at that early stage as it could certainly not as yet be ascertained before delivery of vacant possession. The High Court in *Toh Tiam Cheow & Ors v. Berjaya Times Square Sdn Bhd* [2002] 4 CLJ 301, in the judgment of Ariffin Zakaria J (later Chief Justice) plainly held as follows:

> It would appear that based on cl. 22(2) liquidated damages only become due and payable at the date of the delivery of vacant possession. Thus, prior to that no liquidated damages could be claimed by the plaintiffs as it could not as yet be ascertained.

(see also *Lim Yee Khei v. Berjaya Times Square Sdn Bhd* [2003] 1 CLJ 527 which applied *Toh Tiam Cheow*).

[38] In other words, since the appellant is suing for liquidated damages for late delivery of vacant possession and late completion of common facilities it cannot be said that his cause of action to sue arises on the day the SPA was executed. Plainly, for the purpose of suing for LAD for late delivery of vacant possession and late completion of common facilities the appellant's cause of action against the respondent is not triggered until and unless the date for delivery of vacant possession and date for completion of common facilities has passed.

[39] Secondly, if limitation starts to run on the date of the SPA, but that a LAD claim – should there be a delay – could only be made much later on the expiry of the 36 months, the first three years of the limitation period would for all intents and purposes be wholly illusory.

[40] Accordingly, with the greatest of respect we are therefore not minded to follow the decision in *Obata Ambak* on this point only as we are of the view that the limitation period starts to run from the expiry of the 36 months. On the facts of this case, the appellant's suit is well within time. The appellant's claims are not time-barred under s. 6 of the Limitation Act 1953. There is no triable issue here.

Writ Action Is Correct Mode

[41] In respect of the issue of whether this writ action is the wrong mode of proceedings, we do not agree that the action must be instituted by way of judicial review as mandated under O. 53 of the Rules of Court 2012. This is because although the appellant is questioning the validity of the extension which was an administrative decision granted by the housing controller which falls within the remit of public law, the Federal Court in *Ang Ming Lee* has made it crystal clear that any extension allowed by the housing controller under reg. 11(3) is void. It is already settled that any extension under reg. 11(3) is null and void.

[42] Neither is the appellant seeking any reliefs against the Minister or the Housing Controller. There is therefore no necessity to include the Minister of Urban Wellbeing, Housing and Local Government and the housing controller to this suit.

[43] In any event, the pleaded case of the appellant essentially concerned the contractual breach of the SPA. It is not so much a challenge of an administrative decision. Instead it is about the validity of cls. 25 and 27 of the SPA, and the breach thereof which gives rise to the respondent developer's obligation to pay LAD for failing to deliver the vacant possession and common facilities in accordance with the time stipulation as prescribed under the law.

[44] Furthermore, there is also no necessity for the appellant to seek to quash the extension decision by way of a *certiorari* in a judicial review since in the first place, a void decision is no decision at all (see the Court of Appeal case of *Chan Kwai Chun v. Lembaga Kelayakan* [2002] 3 CLJ 231). The extension is void. There is no decision to challenge. The extension can be disregarded without the need for any judicial review proceedings to have it set aside. There is also no triable issue here.

No Prospective Overruling Only

[45] One other important point raised by the appellant in his written submissions but not dealt with by the learned High Court Judge is that *Ang Ming Lee* has retrospective effect, which thus enabled the appellant to make this LAD claim against the respondent.

[46] It is on this well-settled that if the verdict on fresh interpretation of the law does not come with any declaration as to whether the ruling should apply prospectively, then the general rule that all judgments of the courts apply retrospectively takes effect (see the decision of the Court of Appeal in *Abillah Labo Khan v. PP* [2002] 3 CLJ 521; [2002] 3 MLJ 298).

[47] This question was examined by the High Court in *Alvin Leong Wai Kuan & Ors v. Menteri Kesejahteraan Bandar, Perumahan Dan Kerajaan Tempatan & Ors And Other Applications* [2020] 6 CLJ 55; [2020] 10 MLJ 689 which held that since the Federal Court in *Ang Ming Lee* has not expressly ruled that its decision can only have prospective effect, in accordance with the general rule, the judgment in *Ang Ming Lee* has retrospective effect.

[48] *Alvin Leong* also decided that there are no exceptional circumstances for the doctrine of prospective overruling to apply to the decision of *Ang Ming Lee*. On the contrary, as stated in a number of cases, including *Ang Ming Lee*, given that the object of the regulations and the HDA is to protect a 'homebuyer' (as defined in s. 16A of the HDA), it would be in the interest of purchasers for *Ang Ming Lee* to be given retrospective effect.

[49] We are in this respect mindful of the decision of the Federal Court in the landmark case of *Semenyih Jaya Sdn Bhd v. Pentadbir Tanah Daerah Hulu Langat & Another Case* [2017] 5 CLJ 526; [2017] 3 MLJ 561 where the ruling on the unconstitutionality of s. 40D of the Land Acquisition Act 1960 was held to only apply prospectively. Similarly, in *PP v. Dato' Yap Peng* [1987] 1 LNS 28; [1987] 2 MLJ 311 the Supreme Court gave prospective effect to its decision after taking into account that the decision that the former s. 417 of the Criminal Procedure Code was unconstitutional, if applied retrospectively, would result in creating chaos. Recently also, this court has in *Aminah Ahmad v. The Government Of Malaysia & Anor* [2022] 2 CLJ 726; [2022] 4 MLJ 74 held that in order to mitigate the adverse consequences and hardship that the decision of the court may have on the parties and pensioners as a whole, the decision was to have prospective effect.

[50] Then there is also the decision of the House of Lords in *National Westminster Bank Plc v. Spectrum Plus Limited And Others* [2005] All ER 209 which discussed this doctrine. Lord Nicholls said this:

> [40] Instances where this power has been used in courts elsewhere suggest there could be circumstances in this country where prospective overruling would be necessary to serve the underlying objective of the courts of this country: to administer justice fairly and in accordance with the law. There could be cases where a decision on an issue of law, whether common law or statute law, was unavoidable but the decision would have such gravely unfair and disruptive consequences for past transactions or happenings that this House would be compelled to depart from the principles to the retrospective and prospective effect of court decisions.

[51] Lord Hope had this to say:

> [74] Where the future may lead us we cannot tell. So, like my noble and learned friend Lord Nicholls, I would not rule out the possibility that in wholly exceptionally case the interest of justice may require the House, in the context of a dispute about the state of the common law or even about the meaning or effect of a statute, to declare that its decision is not to operate retrospectively.

[52] We were on the other hand referred by the respondent to the decision of the High Court in *Alpine Return Sdn Bhd v. Matthew Ng Hock Sing & Ors* [2022] 1 CLJ 120 where the developer argued that it would be unreasonably penalised by the retrospective ruling of *Ang Ming Lee* given that the developer had at the material time correctly adopted the procedure that had been set by the Ministry to secure the extension. It was also argued that the retrospective effect of a change in the law through *Ang Ming Lee* could have extreme, disruptive and unfair consequences on developers.

[53] We do not disagree that *Alpine Return* was factually similar to the instant case in one important respect. Like presently, there too, the extension was obtained well before the relevant agreements were signed and there was

A no dispute that the purchasers were well aware that the statutory completion period of 36 months had in that case been approved for extension to 60 months.

[54] And although it held that *Ang Ming Lee* applied retrospectively, the High Court in *Alpine Return* also made these observations:

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> [76] However I am also mindful that the key consideration in *Ang Ming Lee* on the need of the purchasers as the aggrieved parties who needed the protection from the Court is absent and irrelevant in the instant case. Here, both the plaintiff and the defendants were under the assumption that the Extension Letter was valid, not void or illegal when they
> C executed the SPAs at that material time. The plaintiff had proceeded on and relied on the conduct of the purchasers, including the defendants and was of the belief that the time to deliver the vacant possession were agreed to be extended to 60 months and as such accordingly agreed to sell the parcels to the purchasers. As I have stated earlier, the plaintiff would never have otherwise agreed to sell the parcels to the purchasers
> D at the agreed purchase price (discounted and with rebates) and to commence the construction works of the Project. In fact it would not be wrong to state that at all material times the plaintiff had acted as a responsible developer in making the application to amend the construction period of 36 months to 60 months in Schedule H before entering into the SPAs with the purchasers, including the defendants. There is also
> E absolutely no ambiguity in the language of Clause 25 and Clause 27 of the SPAs.
>
> [77] There was nothing untoward in the application for the Extension which was supported by the experts and consultants for the Project. The procedures to apply for the Extension is governed by the Ministry. At all
> F material times, the plaintiff was merely complying with the procedures of the Ministry and the law as then prevailing including in regulation 11(3) of the Regulations. Crucially in my view, there is no suggestion let alone evidence that the plaintiff at any material time had engaged in any illegality in the making of the application for the Extension then.
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> G [78] In contrast, in the other cases, there were elements of irregularity and illegality – on the part of the developers. In *Ang Ming Lee*, *Alvin Leong* and *Kok Chay Har* for examples, applications for extension of time were made and approved after the relevant agreements had been signed with the purchasers without giving them the right to be heard on the extensions. ...
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> H [83] I revert to the objective of the HDA to protect the weaker party which is the purchaser. I further observed that the meaning of social legislation was further explained by Her Ladyship Tengku Maimun Tuan Mat CJ in *PJD Regency Sdn Bhd v. Tribunal Tuntutan Pembeli Rumah & Anor And Other Appeals* [2021] 2 CLJ 441 as follows: ...
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> I [84] In *PJD Regency* (*supra*) the developer failed to deliver vacant possession within the time stipulated in the statutory sale and purchase agreement, and the Federal Court held that the calculation of the LAD

begins from the date of payment of the booking fee and not from the date of the statutory agreement. This is fortified by the HDA and the Regulations being social legislation. And in the interpretation of a social legislation, the Court must give effect to the intention of Parliament and not the intention of parties. Otherwise, the attempt by the legislature to level the playing field by mitigating the inequality of bargaining power would be rendered illusory. Again, here, that the HDA is a social legislation was emphasised because it needed to be in the face of a breach by the developer. In contradistinction, no irregularity can be accused against the plaintiff in the instant case before me.

[85] Not only do these cases involve some form of illegality, default of irregularity on the part of the developers, which is absent in the instant case, but that it is quite evident and it does appear that unlike the purchasers in *Ang Ming Lee* and *Loh Tina*, the defendants in the instant case are resorting to the authority of *Ang Ming Lee* to unjustly enrich themselves despite the fact that the defendants were expecting the completion of the Project within 60 months and they did receive the vacant possession of the parcels within the expected and agreed period of 60 months in accordance with the SPAs, without any protest and objection, and on purchase terms predicated on the said period of 60 months.

[55] We do not disagree that there may be some basis to the contention that there could in the instant case be some exceptional circumstances (which did not arise in *Ang Ming Lee*) that would justify the decision in *Ang Ming Lee* being applied only prospectively in other cases.

[56] Nevertheless, we must accept the important point that the Federal Court in *Ang Ming Lee* did not pronounce expressly or by implication that its decision must have prospective effect on all the letters of extension of time which had been previously issued under the impugned provision of the Regulations to the developers.

[57] In our view therefore, from these leading cases such as *Semenyih Jaya*, *Dato' Yap Peng* and *National Westminster Bank Plc* and as correctly held by *Alpine Return*, the application of the doctrine of prospective overruling must be declared by the court which actually decided on the case which resulted in the clarification or the change in the law. It would not be right for another court, what more if inferior in status such as the High Court below or this court, *vis-à-vis* the Federal Court in *Ang Ming Lee* to provide its ruling on whether that decision of the apex court should be applied prospectively or otherwise. As weighty constitutional and legal issues of major and wide importance are often ultimately heard at the highest court, it is also for the apex court that should ordinarily decide whether or not its ruling that resulted in the change should be applied prospectively instead of the usual retroactive application. That was indeed the pronouncement made by the Supreme Court in *Yap Peng* and the Federal Court in *Semenyih Jaya*.

[58] At the same time it bears emphasis that this court has also in a number of other decisions involving the same *Sentral Residences* project made the clear ruling that as reg. 11(3) has been ruled by *Ang Ming Lee* to be *ultra vires*, the extension that was allowed in pursuance of the said provision must be void.

[59] To the same effect, this court in another recent decision in *UE E&C Sanjia (M) Sdn Bhd v. Lee Jeng Yuh & Anor And Another Appeal* [2021] 10 CLJ 271; [2021] 6 MLJ 864 has also made the following findings:

> [36] We disagree with the defendant on this issue. The decision of the Federal Court in *Ang Ming Lee* (*supra*) is clear that the Housing Controller has no power whatsoever to waive and modify the terms and conditions of the scheduled agreement in the first place. Therefore, the issue of whether the approval is obtained before or after the SPAs have been executed is not relevant.
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> ...
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> [38] Next, there is nothing expressly mentioned in *Ang Ming Lee* (*supra*) regarding the prospectivity of the said decision. Therefore, the decision of the Federal Court *Ang Ming Lee* (*supra*) operates retrospectively (see *PP v. Mohd Radzi Abu Bakar* [2006] 1 CLJ 457; [2005] 6 MLJ 393 (FC) and *Semenyih Jaya Sdn Bhd v. Pentadbir Tanah Daerah Hulu Langat & Another Case* [2017] 5 CLJ 526; [2017] 3 MLJ 561 (FC))".

[60] As such, in the absence of any further pronouncement by the Federal Court, the ruling by the Federal Court in *Ang Ming Lee* on reg. 11(3) of the Regulations being void is to be applied retrospectively. This is also not a triable issue.

Conclusion

[61] In view of the reasons as discussed above, we hold that the decision of the High Court dismissing the summary judgment application against the respondent and allowing the striking out of the appellant's claim to be in error, which therefore warrants appellate intervention.

[62] There are no triable issues to deny summary judgment under O. 14 of the RC 2012 and the suit of the appellant is certainly not obviously unsustainable to warrant it to be struck out summarily under O. 18 r. 19(1) of the RC 2012.

[63] As such, both appeals are allowed such that we set aside the orders of the High Court and direct that the summary judgment application against the respondent (in encl. 5) be allowed, and the striking out application against the appellant's claim (encl. 20) be dismissed.

[64] We also order costs for the appellant.